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CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 103

JOE NATHAN COOPER,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONER

I.

The Fourth Amendment, No Less Than Any Other Command of the United States Constitution, Must Be Enforced by the Rule of Reversal.

The crucial question before the Court is whether the Fourth Amendment is going to be enforced by the same rule of reversal that enforces other commands of the United States Constitution or eviscerated by a harmless error rule.

Even in cases in which the accused's guilt is clearly established by legal evidence, as it is not in this case, the

rule of reversal applies to prevent police and prosecutors from obtaining and using other forms of unconstitutional evidence such as coerced confessions, *e.g., Haynes* v. *Washington,* 373 U.S. 503, 518-519 (1963), statements obtained by custodial police interrogation that are not preceded by warning and waiver, *e.g., Miranda* v. *Arizona,* —— U.S. —— (1966), and perjured testimony knowingly used. *Coggins* v. *O'Brien,* 188 F.2d 130, 139 (1st Cir. 1951) (concurring opinion of Magruder, J.); *cf. Napue* v. *Illinois,* 360 U.S. 264, 269 (1959). The rule of reversal also prevents police and prosecutors from obtaining convictions by violating other constitutional requirements though the evidence of guilt otherwise may be untainted. *E.g., Hamilton* v. *Alabama,* 368 U.S. 52, 55 (1961); *White* v. *Maryland,* 373 U.S. 59, 60 (1963); *Glasser* v. *United States,* 315 U.S. 60, 76 (1942) (counsel); *Stromberg* v. *California,* 283 U.S. 359, 368 (1931) (first amendment); *Williams* v. *California,* 317 U.S. 287, 292 (1942) (full faith and credit); *Smith* v. *United States,* 360 U.S. 1, 9 (1959) (indictment); *Patton* v. *United States,* 281 U.S. 276, 292 (1930) (jury trial); *Tumey* v. *Ohio,* 273 U.S. 510, 535 (1927) (impartial judge); *Rideau* v. *Louisiana,* 373 U.S. 723, 727 (1963) (prejudicial pretrial publicity); *Bollenbach* v. *United States,* 326 U.S. 607, 615 (1946) (unconstitutional presumption).

Respondent asks this Court to create a special exception from this rule of reversal for cases involving evidence seized in violation of the Fourth Amendment and to impose the special burden upon any accused asserting his Fourth Amendment rights of establishing, not simply a reasonable possibility that the unconstitutional evidence might have contributed to his conviction, *e.g., Fahy* v. *Connecticut,* 375 U.S. 85 (1963), but a reasonable probability that the result would have been in his favor if the illegal

evidence had not been admitted. *People* v. *Watson*, 46 Cal.2d 818, 836-837, 299 P.2d 243 (1956). (Resp. Br. 72-78.)

Respondent's contentions have no merit and should be squarely and expressly rejected by this Court.

A. Respondent's Contentions Are Incompatible With Mapp v. Ohio, Wong Sun v. United States, and Miranda v. Arizona.

1. Respondent's contention that persons asserting their Fourth Amendment rights should bear a special burden of establishing the prejudicial effect of illegally seized evidence is incompatible with the principle of *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961) that "Fourth Amendment rights cannot be subjected to special conditions that are not imposed on any other 'basic' constitutional right."

2. Respondent's contention that the coerced confession cases are in a class by themselves because coerced confessions are "inherently prejudicial" (Resp. Br. 26, 24-29) is incompatible with *Miranda* v. *Arizona*, —— U.S. —— (1966) which establishes that "no distinction can be drawn between . . . confessions and 'admissions' . . . [or] between inculpatory statements and statements alleged to be merely 'exculpatory'," —— U.S. at ——, and that in all such cases "the existence of independent corroborating evidence produced at trial is, of course, irrelevant . . . ." —— U.S. at —— n. 52. Cf. also *Haynes* v. *Washington*, 373 U.S. 503 (1963).

3. Respondent's contention that illegally seized evidence cases are not controlled by the rule of reversal of the coerced confession cases is incompatible with *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961) which establishes that the use of

such evidence is "tantamount to coerced testimony" and with *Wong Sun* v. *United States*, 371 U.S. 471, 485-486 (1963) which establishes that no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence.

B. No Precedent Exists in This Court for Dismissing Violations of the United States Constitution as Harmless.

Respondent's contention (Resp. Br. 16-24) that precedent in this Court permits violations of the United States Constitution to be disregarded as only harmless is not supported by the cases cited:

1. *Motes* v. *United States*, 178 U.S. 458 (1899) held that: (a) the use at trial of the preliminary hearing testimony of a co-conspirator whom the prosecution had negligently allowed to escape from jail violated the defendants' right of confrontation, 178 U.S. at 467-474, (b) the error required a new trial for all defendants but one. As to him the error was held harmless because he confessed at the trial. This second holding is both inapposite and obsolete. It is inapposite because the conviction was only obtained after the defendant "stated under oath that he was guilty of the charge preferred against him", 178 U.S. at 476, *i.e.*, in effect on a plea rather than a trial of guilt. It is obsolete because it is inconsistent with the many cases since 1899 that enforce the United States Constitution by a rule of reversal (see Petr's. Op. Br. 25-31) and with the modern rule that a confession following a violation of the Constitution may itself be a poisoned fruit of that violation. See *Fahy* v. *Connecticut*, 375 U.S. 85, 90-91 (1963); *Wong Sun* v. *United States*, 371 U.S. 471, 484-488 (1963).

2. *Snyder* v. *Massachusetts,* 291 U.S. 97 (1934) held that no violation of the United States Constitution occurred when, outside defendant's presence but in the presence of his counsel, the jury was shown a view of the gasoline station where the crime occurred. The Court held that the Fourteenth Amendment does not require "that he must be present every second or minute or even hour of the trial" let alone at a view which historically was "something separate from a trial in court." 291 U.S. at 116-118. A "word of criticism" was spoken to the trial judge because his statement "that one of the three pumps was not there at the homicide goes beyond the bounds of explanation appropriate for showers," 291 U.S. at 118, but the Constitution was not violated by that statement because the defendant not only failed to object but "gave assent by acquiescence" to the same statement later in the trial. The *Snyder* case gave a limited permission to the states to conduct strictly governed views according to established local rules.[1] *Cf. Ker* v. *California,* 374 U.S. 23, 34 (1963). Clearly the case does not stand for the proposition that an abuse of that permission or any other violation of the Constitution can be washed away as harmless.

3. *Johnson* v. *United States,* 318 U.S. 189, 299 (1943) held that "petitioner expressly waived any objection to the prosecutor's comment [on his claim of privilege] by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court." Waiver cases such as

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[1] For purposes of the present case, petitioner assumes without conceding that the *Snyder* case states a viable principle. *Compare Twining* v. *New Jersey,* 211 U.S. 78 (1908), with *Malloy* v. *Hogan,* 378 U.S. 1 (1964) and *Griffin* v. *California,* 380 U.S. 609 (1965) and see, *e.g., Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Miranda* v. *Arizona,* —— U.S. —— (1966); *Pointer* v. *Texas,* 380 U.S. 400 (1965).

the *Johnson* case contradict rather than support respondent because they confirm that the Constitution must be enforced unless the individual whose rights have been violated consents to nonenforcement. Such cases by no means allow appellate courts to take away those rights without the accused's consent or on the basis of speculation whether prejudice resulted from the violation.

4. *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) does not support respondent because the Court expressly reserved the question whether the evidentiary use of unconstitutionally seized evidence could ever be dismissed as harmless and applied an interim "reasonable possibility" test to reverse a conviction, not to affirm one. Unlike an affirmance that becomes a precedent for future violations of constitutionally protected rights, the reversal in the *Fahy* case was a warning that Fourth Amendment rights deserved, at the very least, the interim protection of a strict test of appellate review. *Stoner* v. *California,* 376 U.S. 483 (1964) is distinguishable for the same reason.

C. Linkletter v. Walker Contradicts and Does Not Support Respondent's Contentions.

In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), a case in which the defendant collaterally attacked his state conviction in a federal habeas corpus proceeding, this Court held that the exclusionary rule of *Mapp* v. *Ohio,* 367 U.S. 643 (1961) did not apply retroactively to upset judgments that had become final before *Mapp* was decided.

The State of California does not cite *Linkletter* for either its specific holding, or for the more general proposition that some rules of constitutional law are not applied retroactively, or for the crucial considerations of the deci-

sion. Those considerations, each of which was essential to the decision, were that the Court would not apply *Mapp* v. *Ohio* retroactively in cases: (1) in which a final judgment had been obtained and a hearing would be required on the excludability of reliable and relevant evidence, (2) in which the evidence was admissible under controlling decisions of this Court under the Fourth Amendment, (3) in which there was no impairment of "the very integrity of the fact finding process," 381 U.S. at 639, and (4) in which the trial otherwise complied with the Fourteenth Amendment. Rather, by a tortuous process of reasoning, the state contends that because the Court refused to apply *Mapp* retroactively, the Court should also uphold any conviction obtained at a "fair trial" (Resp. Br. 32) even though unconstitutionally obtained evidence is admitted into evidence at the trial, unless the accused can convince the appellate court that without such evidence he probably would not have been convicted (Resp. Br. 30-32, 72-75). However, the state's argument recognizes one exception: If the unconstitutionally obtained evidence is a coerced confession, the conviction must be reversed, of course, because as we all know, coerced confessions are "inherently prejudicial" while illegally seized real evidence is not.

The state's argument is illogical, is not supported by the coerced confession cases[2] and is made possible only by its ignoring the basic issues involved in *Linkletter* and the crucial elements of the holding in that case:

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[2] *E.g., Haynes* v. *Washington*, 373 U.S. 503 (1963); *cf. Miranda* v. *Arizona*, 384 U.S. 436 at n. 52.

1. *The element of finality is absent from this case.*

The Court in *Linkletter* was concerned about upsetting final judgments based on relevant and reliable evidence and imposing the burden on the judicial system of holding hearings on the excludability of such evidence. It was not concerned with preserving illegality, already established as such after a hearing, in judgments not yet final, as respondent would have the Court act here.

2. *The deterrent purpose of the exclusionary rule was not undercut in* Linkletter, *whereas it would be undercut severely by a rule that allows violations to be disregarded as only harmless error.*

The Court's statement in *Linkletter* that "the misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved" reflects its concern with preserving the deterrent function of the exclusionary rule in cases where it is most needed, such as this case, to deter police and prosecutors from ignoring the constitutional rights of persons suspected of crime.

In attempting to tie *Linkletter* to the instant case, respondent reveals a fundamental misunderstanding of this Court's role in developing principles to accommodate responsible law enforcement and protection of the constitutional rights of individuals. The police conduct in pre-*Mapp* cases was not approved in *Linkletter*, but was treated as a bygone that could not be remedied. In cases not involving the elements of *Linkletter*, this Court has not hesitated to enforce the Constitution with a rule that will protect constitutional rights, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Griffin* v. *Illinois*, 351 U.S.

12 (1956); *Miranda* v. *Arizona*, —— U.S. —— (1966); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) and it should not hesitate to do so in the instant case. Although the rule of reversal is necessary in all 50 states, if California's progressive and enlightened law enforcement officials and judges respect constitutional rights they will have no ground to feel the insults and affronts that respondent claims for them. (Resp. Br. 62.) A state such as California that has been in the vanguard of the states that accept the decisions of this Court will not be affronted by a rule that will not affect its officials if they respect the Constitution. California should willingly accept a rule that will encourage other states to act with the solicitude for constitutional rights that California says it has.

3. *The state has no justifiable reliance on earlier decisions of this Court to protect in this case.*

In *Linkletter*, as in *Tehan* v. *Shott*, 382 U.S. 406 (1966) and *Johnson* v. *New Jersey*, —— U.S. —— (1966), the fact that the states had relied on an old rule announced by the Court (*e.g.*, *Wolf* v. *Colorado*, 338 U.S. 25 (1949)), was crucial to the decision. There is no such reliance interest in this case: For example, *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) made clear that this Court would strictly review a state's claim that its violation of the Constitution caused no harm to a defendant, and *Fahy* v. *Connecticut*, 375 U.S. 85 (1963) not only reversed a conviction despite such a claim but gave fair notice to the states that the validity of their harmless error rules was an open question. Nor can the state claim any reliance interest contrary to *Preston* v. *United States*, 376 U.S. 364 (1964). The *Preston* case changed the erroneous assumptions of some California courts that searches of impounded cars were

lawful despite the absence of a warrant or the incidence of an arrest (see R. 267-268) but no permission had been extended to the states to indulge in those assumptions, compare *Wolf* v. *Colorado, supra,* and they were far from universally followed. *E.g., People* v. *Garrison,* 189 Cal. App.2d 549, 552-556, 11 Cal. Rptr. 398 (1961); *Rent* v. *United States,* 209 F.2d 893, 896-899 (5th Cir. 1954).

4. *Even if the state's* Linkletter *argument were otherwise valid, it does not apply in this case because the unconstitutional evidence used against defendant, although highly relevant, was not reliable.*

The illegally seized paper was "highly relevant," as the Attorney General argued and conceded in the District Court of Appeal (R. 254) and was of crucial importance to a weak case (see Petr's. Op. Br. 14-18). It was not reliable evidence, however, and the fact finding process that allowed the prosecutor to have a damaging inference drawn from the police-controlled paper without supporting the inference with testimony or any scientific testing did not have the integrity required by *Linkletter.* (Petr's. Op. Br. 20-21.) See *People* v. *Hall,* 62 Cal.2d 104, 112 n. 8, 41 Cal. Rptr. 284, 396 P.2d 700 (1964).[3]

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[3] In the *Hall* case, the California Supreme Court reversed a defendant's conviction of murder because the evidence was insufficient and stated that "Even if we could conclude that the meager evidence presented was sufficient, we might be compelled to reverse the judgment on the ground that the police disabled the prosecution from affording defendant a fair trial. The police kept him in custody for four days, denied his request for counsel, and failed to make tests that might have been probative of innocence or guilt. Whether or not due process requires a reasonably complete investigation of a crime, it is doubtful that a conviction can be upheld when an inadequate investigation has produced limited evidence and the police have rendered the defendant powerless to provide exculpatory evidence himself." 62 Cal.2d at 112 n. 8.

D. The Application of a State's Harmless Error Rule to Dismiss Violations of the United States Constitution Is Not an Adequate and Independent State Ground of Decision That Will Preclude Review Either by This Court or a Federal Court in Habeas Corpus Proceedings.

Respondent concedes that the validity of a state's harmless error standard "raises a federal question" but contends that "the correctness of the application of that state standard . . . is not a federal question at all and is indeed an adequate and independent state ground of decision" that precludes review both by this Court and a federal court in habeas corpus proceedings. (Resp. Br. 81, 79-88.)

Respondent's contentions are clearly erroneous: Since *Martin* v. *Hunter's Lessee,* 1 Wheat. (14 U.S.) 304, 345-46 (1816), this Court's jurisdiction to review state court judgments has been essential to prevent erosion of the Constitution by "jarring and discordant judgments" of state judges. When such a judgment, even though it is based on "untenable construction more than the unconstitutional statutes," is challenged on constitutional grounds, an opportunity for this Court to review the challenge must be kept open since "to hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & I.R.R.* v. *Indianapolis ex rel. Ketcham,* 194 U.S. 579, 589 (1904); see *Henry* v. *Mississippi,* 379 U.S. 443, 446-449 (1965); *O'Connor* v. *Ohio,* —— U.S. —— (35 L.W. 3174, Nov. 14, 1966). See also the coerced confession cases. *E.g., Payne* v. *Arkansas,* 356 U.S. 560 (1958); *Haynes* v. *Washington,* 373 U.S. 503 (1963). An opportunity for independent review in federal habeas corpus proceedings must be kept open also to protect from erosion the con-

stitutional rights of state claimants who have not deliberately bypassed state procedures. *Fay* v. *Noia*, 372 U.S. 391 (1963). The validity of a state's application of its harmless error rule, in particular, has been expressly held to be a federal question. *E.g., Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). To overrule the *Napue* and *Fahy* cases would not only circumvent the foregoing other principles of judicial review, starting with *Martin* v. *Hunter's Lessee, supra*, but would be particularly inappropriate in this case because an essential ingredient of the independent state ground doctrine is missing, namely the consistency of the state ground with prior state decisions. *E.g., N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 454-458 (1958). As Appendix B to petitioner's opening brief demonstrates, the notion that California's harmless error rule excuses violations of the United States Constitution is nothing more than a recent aberration that is not supported by the history, purpose, and prior California interpretations of that rule.

The enormous burden of review that the harmless error rule would impose upon this Court and the federal courts in habeas corpus proceedings cannot be avoided by the adequate and independent state ground doctrine. It can be avoided by enforcing the Fourth Amendment with the same rule of reversal that enforces the other commands of the United States Constitution.

II.

The Fourth Amendment Does Not Permit Searches and Seizures That Are Made Without Warrants, or Are Not Incident to an Arrest, or Are Made in the Absence of Exceptional Circumstances Such as the Threatened Destruction or Removal of Evidence or Contraband. Respondent's Contentions to the Contrary Have No Merit.

Respondent (at Resp. Br. 96-110) advances the notion that searches and seizures such as the one that occurred in this case may be upheld as reasonable even though there was time for the state to obtain a search warrant but no warrant was obtained. This assertion is made in the face of the growing concern over searches that police and prosecutors attempt to justify as "incident" to a lawful arrest[4] and despite the absence of a moving automobile carrying contraband, *Carroll* v. *United States*, 267 U.S. 132 (1925), or "exceptional circumstances" such as the threatened removal or destruction of evidence or contraband. *Johnson* v. *United States*, 333 U.S. 10, 14-15 (1948); *Preston* v. *United States*, 376 U.S. 364 (1964).

A. The State's Position Is Not Supported by Precedent.

The State's argument is founded upon a profound misunderstanding of the Fourth Amendment, which provides:

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[4] In *Wong Sun* v. *United States*, 371 U.S. 471, 480 n. 8 (1963), the Court stated that "Our discussion implies no view whether a search warrant should be obtained where a search is conducted incident to a valid arrest" and thereby left no doubt that the question is an open one. See *Johnson* v. *United States*, 333 U.S. 10 (1948); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). For suggestions of appropriate limits, see Maguire, Evidence of Guilt 192-193 (1959), and for criticism of California cases, see Manwaring, *California and the Fourth Amendment*, 16 Stan. L. Rev. 318, 336-346 (1964).

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is true that in certain circumstances searches can be made without a warrant, but these limited exceptions do not support the state's assertions here.

The requirement of a warrant unless such "exceptional circumstances" exist is so compelling that not even a state's lease-forfeiture statute will validate a landlord's consent to search his tenant's room, *Chapman* v. *United States,* 365 U.S. 610 (1961), and not even the government's control over an employee's desk will permit it to search that desk for personal papers without a warrant and without the employee's consent. *United States* v. *Blok,* 188 F. 2d 1019 (D.C. Cir. 1951). Even respondent's lead-off case, *Carroll* v. *United States, supra,* does not support its contentions, for there the Court made clear that "in cases where the securing of a warrant is reasonably practicable, it must be used." 267 U.S. at 156.

The state suggests that there was little impairment of defendant's right of privacy in this case since police commonly inventory the contents of impounded cars and, further, that since the car and its contents were in the possession of the police, there was no invasion of privacy at all. To support this curious argument the state attempts to compare defendant's car to a murderer's rifle or a burglar's sack. All of these arguments, however, would apply to a

police search of an arrestee's home a week following his arrest at his home. The police might suggest that in that case an "inventory" was proper to protect the homeowner, the police, and the watchman guarding the house. Given the right to inventory the home, the right to seize evidentiary material and to use it at trial would follow as of course. Since the police could have searched the home at the time of the arrest, a subsequent search would impair only slightly the defendant's right of privacy. Finally, if a defendant were suspected of using his home to prepare drugs for sale, for example, the home would fall into the category of the burglar's sack or murderer's rifle as "instrumentalities of the crime."

Such a watered-down version of the Fourth Amendment is not the law, however, *e.g.*, *Agnello* v. *United States*, 269 U.S. 20, 33 (1925) ("belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search without a warrant") nor is it the law for impounded cars. Each of the arguments suggested by respondent has been foreclosed by *Preston* v. *United States*, 376 U.S. 364 (1964).

B. Precedent and Reason Require That This Warrantless Search Be Declared Illegal.

Implicitly recognizing that *Preston* is foursquare against it, respondent argues that if *Preston* means what it says, state and lower federal courts will refuse to follow it. (Resp. Br. 104-106.) Apart from the fact that this is a surprising assertion to be found in a brief in which the State bristles at any suggestion that police, prosecutors and lower court judges cannot always be relied upon to support an accused's Fourth Amendment rights (see Resp. Br. 66),

the point is without merit. The cases cited below,[5] in addition to the instant case, have followed *Preston;* and there is no indication that law enforcement is foundering in these jurisdictions.

The instant case and *Preston* are perfect examples of cases in which there is no justification for refusing to seek a search warrant. When an automobile is impounded there is no need for speed in searching, no fear of losing control of evidence or contraband known or supposed to be in the car. The fact that an arrestee's privacy may have been invaded at an earlier date when "exceptional circumstances" may have warranted an intrusion certainly cannot justify a subsequent invasion when the only reason for refusing or failing to obtain a search warrant would be that the police had no probable cause to believe that items subject to seizure were in the car. That reason for a warrantless search points up the fact that this case is not like the one mentioned by Chief Justice Vinson, dissenting in *Trupiano* v. *United States,* 334 U.S. 699, 714 (1948). If the police have probable cause for a search, there is no reason not to get a warrant. If they do not have probable cause, any search will be an unjustifiable expedition into private papers and effects and a blatant violation of Fourth Amendment fundamentals. *Entick* v. *Carrington,* 19 Howell State Trial 1029 (1765), *Boyd* v. *United States,* 115 U.S. 616 (1886), *Weeks* v. *United States,* 232 U.S. 383 (1914); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

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[5] See following *Preston, e.g., State* v. *Edmondson,* 379 S.W. 2d 486 (Mo. 1964) (paper under floorboard); *United States* v. *Cain,* 332 F.2d 999 (6th Cir. 1964) (bags of money in car); *State* v. *Riggins,* 64 Wash. 2d 881, 395 P.2d 85 (1964) (revolvers under dash).

Furthermore, precedent and sound policy support a requirement that police obtain a search warrant in situations such as presented by this case and *Preston*. At least since *Schneider* v. *Irvington*, 308 U.S. 147 (1939) this court has held that a state may not deny or suppress First Amendment rights in the exercise of its police powers for lawful purposes if those lawful purposes can be accomplished in some other, less restrictive, manner. See, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *NAACP* v. *Button*, 371 U.S. 415 (1963); and *Gibson* v. *Florida Investigating Comm.*, 372 U.S. 539 (1963). The consideration for the privacy and integrity of individuals expressed in the Fourth Amendment requires the same approach to be taken in determining when a warrant must be obtained.

The state argues (Resp. Br. 101), quite irresponsibly, that requiring a warrant in the instant case would be a terrible imposition.

> "Were this Court to deny enforcement officials the right to gather such evidence from an accused in lawful custody, a necessary weapon in the arsenal of detection would be severely impaired. In recent years this Court has announced constitutional principles that necessarily diminish the use of interrogation and, at the same time, encourage police investigation. *Miranda* v. *Arizona*, 384 U.S. 436, 477-81 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 492 (1964). As a practical matter, this Court cannot possibly insist that enforcement officials rely upon independent investigation and at the same time deny them an integral aspect of such investigations."

> "In the instant case there was an offense committed by the petitioner, sale of narcotics, the police properly

> seized an instrumentality of that crime, the automobile, and thereafter examined the instrumentality for the fruits of that crime. It is unreasonable and illogical to say that when officers lawfully come into the possession of an instrumentality of the crime that they may not later lawfully examine it, unless they secure a search warrant."

However, the question presented is not whether the State could have searched defendant's car; the question is whether they had to obtain a warrant before doing so. Defendant insists that the answer must be "Yes."

Obviously there will be times when police officers reasonably arrest a person in an automobile and there is not time to obtain either an arrest warrant or a search warrant. But instead of assuming away the problems as the state does in the second quote above, assume the person is innocent of any crime but is guilty of belonging to some despised minority, as the contents of his automobile will show. If the police did not search his automobile at the time of arrest, assuming without conceding they could legally have done so, it is imperative that the independent judgment of a magistrate be inserted between the individuals and the police, after the "exceptional circumstances" have been removed, in order to protect the individual's privacy to the full extent provided for in the Fourth Amendment.

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by

> a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *U.S.* 333 U.S. 10, 13-14 (1948).

The foregoing reasoning also requires rejection of respondent's attempt (Resp. Br. at 107) to distinguish the *Preston* case on the ground that there the search was for evidence not relating to the arrest whereas here it turned up a piece of paper that respondent has earlier conceded was highly relevant to the crime charged. (R. 254). The closer the relationship a proposed search has to the crime for which the defendant is arrested, however, the better will be the prosecution's grounds for obtaining a search warrant, and the more unjustifiable its reasons for not taking the trouble to obtain one.

C. The California Forfeiture Statute Does Not Provide a Basis for Distinguishing This Case From Preston:

The record in the present case shows only that the police took possession of defendant's car. There is no evidence that the state ever acquired title to the car, either pursuant to forfeiture proceedings or otherwise (R. 264-265), even assuming the doubtful proposition that the *Preston* case could be undercut by such a title theory. Pending a judicial determination, the forfeiture statute at the most authorized

the police to take the automobile into custody. Thus, the state's assertion of the right to search the car is based only on a right to custody. In *Preston* the state had no less interest in the defendant's car. There, as here, the police were considered to have lawful custody of the car and there, as here, the car was unlawfully searched. *Cf. United States* v. *Blok,* 188 F. 2d 1019 (D.C. Cir. 1951). The cases relied on by respondent for a contrary argument either failed to consider the *Preston* case, *e.g., Burge* v. *United States,* 333 F. 2d 210, 218-219 (9th Cir. 1964), *on rehearing,* 342 F. 2d 408, 414, *cert. denied,* 382 U.S. 829 (1965); *United States* v. *Ziak,* 360 F. 2d 850 (7th Cir. 1966), or merely said that *Preston* was distinguishable without suggesting any reasons why the proffered distinction was significant. *E.g., Drummond* v. *United States,* 350 F. 2d 983, 988 (8th Cir. 1965).

The state's contentions that its vehicle forfeiture statute[6] justified the search and seizure here involved are without merit for the additional reason that they are foreclosed by the District Court of Appeal's controlling construction of its own state's statute as not authorizing warrantless searches of impounded cars. The question of the proper state law construction of the state statute was fully argued

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[6] Calif. Health & Safety Code 11611 provides: "Any peace officer of this state, upon making or attempting to make an arrest for a violation of this division, shall seize any vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforcement of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered."

to the District Court of Appeal and cannot and should not be relitigated here. (Cert. Rec. items 15, 18, 19, 20, 21; Petr's. Op. Br. 12 n. 5.)[7]

III.

The State's Contentions Are Without Merit That This Court Cannot and Should Not Reverse Defendant's Conviction Despite the State's Deliberate Failure to Produce Its Own Participating Informer Who Was the Only Witness Who Could Positively Identify or Exonerate Defendant.

Respondent's contention that this Court cannot hear defendant's plea for protection of his right of confrontation is essentially that he followed the wrong form of action, namely that he presented his plea by petition for hearing to the California Supreme Court instead of by supplemental brief or petition for rehearing in the District Court of Appeal. (Resp. Br. 115.) As shown by defendant's

[7] Respondent's contentions also are based in part on an inaccurate representation of the record. For example, respondent's statement that "no question has ever been raised as to the lawfulness of the arrest and seizure at any stage of the proceedings" (Resp. Br. 96) is contradicted by the record. Defendant questioned both his arrest (see R. 274) and the seizure of the car. In addition to his argument to the District Court of Appeal that the car seizure statute did not authorize the search of the car and seizure of the paper, defendant also urged that the seizure of the car itself was not justified because the arrest was made by a federal agent Yates and not a "peace officer of this state" or for a violation of a state narcotics law as required by the statute. Calif. Health & Safety Code, Sec. 11611. See Cert. Rec. item 18, pp. 13-16. The District Court of Appeal stated in its opinion, however, that defendant was taken as "a state prisoner" (R. 261) and that the car "was in lawful custody of the officers at the time of the search in question, at least under Health and Safety Code, Sec. 11611, if not on other grounds" (R. 266).

opening brief, however, further action in the District Court of Appeal was unnecessary, would have been futile, and could not fairly be expected of defendant, given the crucial change in the constitutional law of confrontation that was effected by *Pointer* v. *Texas,* 380 U.S. 400 (1965) after all the briefs had been filed and the argument had been heard in the District Court of Appeal.

Respondent makes one comment that might have some merit if it were applicable to the case, namely that a state court should have "a fair opportunity to squarely meet the issue" before it is presented to this Court. (Resp. Br. 118.) The same judges of the District Court of Appeal who decided the instant case, however, decided the confrontation issue adversely two days later in another case, *People* v. *Brooks,* 234 Cal.App.2d 662, 678, 44 Cal. Rptr. 66 (1965) and, in addition, defendant fully presented the issue to the California Supreme Court in the instant case. (Cert. Rec., item 23, pages 3-4, 17-21.) Defendant therefore turned the corners of procedure squarely and at least as sharply as, if not more than, the defendants in *Griffin* v. *California,* 380 U.S. 609 (1965), reversing *People* v. *Griffin,* 60 Cal.2d 182, 32 Cal. Rptr. 24, 383 P.2d 432 (1963) and *O'Connor* v. *Ohio,* —— U.S. —— (35 L.W. 3174, Nov. 14, 1966) and 382 U.S. 286 (1966). His claim accordingly is properly before this Court.

On the merits, respondent's argument also is untenable:

1. Respondent contends that cases relied on by defendant[8] depend on an entrapment defense and that "the

[8] *Lopez* v. *United States,* 373 U.S. 427, 444-445 (1963). (concurring opinion of Chief Justice Warren); *United States* v. *Clarke,* 220 F.Supp. 905 (E.D. Pa. 1963); *United States* v. *Ramsey,* 220 F.Supp. 86 (E.D. Tenn. 1963).

established rule under both California and federal law is that the defense of entrapment must affirmatively be put in issue at the trial level before it can be raised on appeal. In the instant case, it was not even presented on appeal and respondent accordingly contends that the conclusion of waiver is inescapable." (Resp. Br. 125-126.)

The foregoing quoted statement misstates the law and the record.

At the time of defendant's trial and prior to *People* v. *Perez*, 62 Cal.2d 769, 775-776, 44 Cal.Rptr. 326, 401 P.2d 934 (1965), a defendant in a criminal case in California was required "to admit guilt as a condition to invoking the defense of entrapment." 62 Cal.2d at 776. Because the *Perez* case changed the law, California defendants may raise an entrapment question for the first time on appeal if their trials occurred before the *Perez* case. See, *e.g.*, *People* v. *Marsden*, 234 Cal.App.2d 796, 799-800, 44 Cal.Rptr. 728 (1965). Defendant in the instant case did so in his petition for hearing to the California Supreme Court and argued, among other points, that production of the informer as a prosecution witness was essential to determine whether a defense of entrapment existed and, if so, to lay the basis for that defense under the *Perez* case without admitting guilt. (Cert. Rec. item 23, p. 20.)

2. It is no answer for respondent to point out that defendant knew the identity of the informer and that the informer was "available." (Resp. Br. 123.) He was only available upon release from the county jail under a court order conditioned on a showing of the materiality of the expected testimony. Calif. Code Civ. Proc. §1995; 28 Ops. Cal. Atty. Gen. 59 (1956). Furthermore, under present

California law, a party producing a witness is deemed to vouch for his credibility, *People* v. *Porterfield,* 186 Cal.App. 2d 149, 157-159, 8 Cal.Rptr. 897 (1960), and a party may not impeach his own witness by evidence of bad character. Calif. Code Civ. Proc. §2049. Moreover, a party may impeach his own witness by his prior inconsistent statements only where the party is able to show that he is both surprised and damaged by the witness' testimony given in court. *People* v. *Kidd,* 56 Cal.2d 759, 765-766, 16 Cal.Rptr. 793, 366 P.2d 49 (1961); *cf.* Calif. Evid. Code §785 (which will become effective on January 1, 1967). Although California Code of Civil Procedure section 2055 allows a party to call certain witnesses as adverse witnesses with the right of cross-examination, this code section applies only to civil actions and proceedings and not to criminal actions. *Oliver* v. *Superior Court,* 197 Cal.App.2d 237, 240, 17 Cal.Rptr. 474 (1961). Therefore, if defendant had called the informer as a witness, he would have had to make the informer his own witness and vouch for his credibility and his good character. See also *Lopez* v. *United States,* 373 U.S. 427, 445 (1963) (concurring opinion of Chief Justice Warren). Respondent's attempt to shift instead of "shoulder the entire load," *Tehan* v. *Shott,* 382 U.S. 406 (1966) denied to defendant his crucial right of confrontation.

3. Even more harmful to the right of confrontation than respondent's foregoing mistaken representations of the record and California law in this particular case are its general contentions (a) that the prosecution has no obligation to produce its own participating informer as a witness at the trial even though that informer is the only person who can positively identify or exonerate a defendant and (b) that if there is such an obligation, it is strictly limited not

only to cases in which the defendant pleads entrapment but also by the technicalities governing the hearsay rule. (Resp. Br. 118-126.)

Defendant's claim, however, is not simply that he was deprived of an opportunity to raise an entrapment defense and that hearsay evidence was used to convict him, important as these points are in the instant case. Defendant's confrontation claim goes to the requirements of basic fairness in a criminal prosecution.

Notwithstanding respondent's glowing claims for training programs (Resp. Br. 53-54), the record in this case presents a dismal picture of lawless, questionable, and negligent law enforcement, a picture that places the confrontation claim in appropriate perspective.[9]

The police commenced their activities against defendant by eavesdropping on a private phone located at his home. (R. 192-193, R. 61-62.) They next engaged in the sordid practice of "interrogating" an unreliable and untrustworthy informer (R. 127, 59-60) for several hours, obtaining his agreement thereafter to act as a police decoy and cat's paw in crime (R. 257-258),[10] and following up that agreement by reducing a charge against him from sale of heroin to

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[9] The facts are stated in summary and as necessary background only and not to "smuggle additional questions into a case" that were not fairly raised in the petition for a writ of certiorari. *Irvine* v. *California*, 347 U.S. 128, 129, 130 (1954).

[10] The record does not reveal the extent to which "police pressure [was] brought to bear to persuade [him] to turn informer," *Lopez* v. *United States*, 373 U.S. 427, 444 (1963) (concurring opinion of Chief Justice Warren) or whether any of the required warnings were given to the informer prior to his interrogation. *Cf. Miranda* v. *Arizona*, —— U.S. —— (1966); *Jones* v. *United States*, 362 U.S. 257, 265 (1960); *People* v. *Dorado*, 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361, *cert. denied*, 381 U.S. 937, 946 (1965).

possession. (R. 127-28.) See *Lopez* v. *United States*, 373 U.S. 427, 444 (1963) (concurring opinion of Chief Justice Warren). The police then eavesdropped, once again, on the informer's phone call to a private home (R. 258)[11] and set up what is known as the "affirmative trap" in narcotics cases.[12] The police aimed to administer the trap through the use of constant surveillance by three officers and marked money but such constant surveillance was not achieved, the marked money was not found, the testimony of the officers was in conflict, and no officers positively identified defendant. (See Petr's. Op. Br. 14-17.) The officers then failed to catch their suspect at the scene of the purported narcotics transaction. (R. 260.) After federal agent Yates arrested the defendant later in the afternoon, the police pressed him to the hood of his car, lacerated his nose and

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[11] As Chief Justice Warren's concurring opinion in *Lopez* v. *United States*, 373 U.S. 427, 444 (1963) makes clear, the use of participating informers and eavesdropping on the informer's conversations coupled with nonproduction of the informer at the trial are closely related police practices that raise serious questions of invasion of protected communications and fundamental fairness in criminal prosecutions. Defendant specifically raised an eavesdropping question that was decided adversely to him in the District Court of Appeal. That question was not specifically raised in the petition for certiorari except insofar as the confrontation question herein raised fairly includes it under the theory of the concurring opinion in the *Lopez* case. Defendant notes that the Court now has before it cases, *Osborne* v. *United States*, No. 29, and *Hoffa, et al.* v. *United States*, Nos. 32-35, that may also bear on these questions. *Cf.* also *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960); *Pollard* v. *United States*, 352 U.S. 354, 359 (1957).

[12] The District Court of Appeal in two sentences disposed of defendant's position that the trap was unconstitutional (R. 271) but other writers find more difficulties with its use, see Note, *The Constitutional Status of the Entrapment Defense*, 74 Yale L.J. 942 (1965) and even the police find a first trap sale "faulty from an evidentiary point of view" if the marked money as in the instant case, is not found. See Comment, *Administration of the Affirmative Trap*, 31 U. Chi. L. Rev. 137, 156 at n. 83.

loosened his teeth (R. 97-98, R. 201-202, 214-218, 220-221, 223-225, 229-230) and took him to the police station for an unconstitutional interrogation. (R. 272-273.) Defendant then suffered an unconstitutional search of his car and seizure of a crucial piece of brown paper that the prosecution unconstitutionally used as evidence against him at the trial. (R. 263-269.) The prosecution did not even make any effort to show scientifically that the police-controlled paper came from the same source as the brown paper that wrapped the bindles that defendant was accused of selling. (See text at n. 3, *supra*.) The prosecution then deliberately failed to produce the "key figure in this prosecution," *United States* v. *Clarke*, 220 F.Supp. 905, 909 (E.D. Pa. 1963), namely the government's unreliable and untrustworthy informer, even though he was available and even though confrontation and cross-examination were essential to the defense. (See Petr's. Op. Br. 43-47.)[13]

[13] The last act of the police has been to destroy the piece of brown sack paper that brought this case here, an act accomplished despite the express order of the District Court of Appeal augmenting the record to include the paper and the other exhibits (Cert. Rec. item 10) and despite the facts that defendant's direct appeal rights to this Court had not been exhausted, that his petition for a writ of certiorari was on file, and that the statutory one-year waiting period for disposal of documentary evidence had not yet expired. Calif. Pen. Code §1418.5. The information concerning this destruction of the paper was requested of and graciously furnished by the California Attorney General's office in a letter to petitioner's counsel that the State Bureau of Narcotic Enforcement destroyed the piece of brown sack paper along with the other material in exhibits 4 and 7 apparently in accordance with a superior court order dated September 23, 1965 (see also Cert. Rec. item 26), a type of order that the state customarily obtains ex parte. The paper was apparently treated as a disposable "narcotic," Calif. Health & Saf. Code §11653, and its treatment by the police as such illustrates again the close connection that they felt existed between the heroin turned over by the informer and the illegally seized paper. On premature destruction of exhibits, see generally Note, *Disposition of Physical Exhibits Used in Criminal Trials*, 20 Wash. & Lee L. Rev. 67 (1963).

The state deployed each "weapon in [its] arsenal of detection" (Resp. Br. 101) against defendant in this case and then forced him to defend without the shield of confrontation and cross-examination. The conviction it obtained in this manner must be reversed, not only to observe the rudimentary guaranties of the United States Constitution that were not observed here but to see that justice is done to an accused, as it was not done in this case.

Conclusion

Training programs for police and prosecutors are of vital importance. Respondent is to be commended for being a leader in developing such programs. It would be a great day for constitutional rights if all states had such programs and if they were successful.

Defendant respectfully submits, however, that training programs are not enough. Some trainees do not learn their lessons. For those who do not, what is needed is a decision in this case that will protect the Fourth Amendment rights of all persons suspected of crime, and their right to confront and cross-examine the witnesses against them, from police and prosecutors who are either ignorant of or refuse to respect those rights. Such a decision will not interfere with any state's law enforcement programs at all, if state officials respect a man's rights under the United States Constitution, as they did not in this case.

For the reasons stated herein and in the opening brief, the judgment of the District Court of Appeal should be reversed with directions to reverse the judgment of the trial court.

Respectfully submitted,

MICHAEL TRAYNOR
Counsel for Petitioner
By appointment

November 25, 1966.

Subject Index

Table of Authorities Cited

PETITION FOR MODIFICATION OF OPINION AND FOR REHEARING

UNDER THE COURT'S OPINION ON THE MERITS, THE ONLY APPROPRIATE DISPOSITION IS TO VACATE AND REMAND, NOT TO AFFIRM.

The California District Court of Appeal decided that the search of petitioner's impounded car and the seizure of evidence for a criminal prosecution were unauthorized by the state vehicle forfeiture statute and unconstitutional under *Preston v. United States*, 376 U.S. 364 (1964) but that the use of the seized evidence was harmless.

This Court affirmed.

It is respectfully submitted, however, that affirmance is not an appropriate disposition and that the only appropriate disposition under the Court's opinion on the merits is to vacate the judgment below and to remand the cause to the California District Court of Appeal.

1. The California court's decision on the constitutional point was not affirmed because this point was held "erroneously decided." Adv. Op., p. 1.

2. The California court's decisions on statutory construction and harmless error were not affirmed because these are matters of state law and were not decided under the Court's opinion.

3. In similar cases, when this Court has held that the state court is free of the federal compulsion it erroneously invoked, the judgment below has been vacated and the cause remanded so that the state

court can reconsider the state grounds and "be free to act." *State Tax Comm'n v. Van Cott,* 306 U.S. 511, 514-516 (1939); *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952); *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U.S. 1 (1950); *San Diego Bldg. Trades Council v. Garmon,* 353 U.S. 26 (1957); *cf. Patterson v. Alabama,* 294 U.S. 600, 606-608 (1935); *Standard Oil Co. v. Johnson,* 316 U.S. 481 (1942); *Minnesota v. National Tea Co.,* 309 U.S. 551 (1940); *Bell v. Maryland,* 378 U.S. 226, 238-241 (1964); *Henry v. Mississippi,* 379 U.S. 443 (1965); *Watts v. Seward School Bd.,* 381 U.S. 126 (1965); *Dept. of Mental Hygiene v. Kirchner,* 380 U.S. 194 (1965). See also *Union Trust Co. v. Eastern Airlines, Inc.,* 350 U.S. 962 (1956). See generally Note, 74 Harv.L.Rev. 1375 (1961); Sandalow, *Henry v. Mississippi and the Adequate State Ground,* 1965 Sup. Ct. Rev. 187; Note 49 Yale L. J. 1463 (1940).

4. Vacating and remanding will permit the California court to impose the higher standard of a warrant in this case, to reconsider its harmless error rule for violations of such standards in light of *Chapman v. California,* No. 95, and to reconsider its application of such a rule to a petitioner whose conviction "rested in part" on evidence that may still be illegal in California. See Adv. Op. p. 1; *e.g., Dept. of Mental Hygiene v. Kirchner,* 62 Cal.2d 586, 400 P.2d 321 (1965), after vacation and remand in 380 U.S. 194 (1965); *cf.* the adoption of higher standards in illegal evidence cases in *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905 (1955), after *Wolf v. Colorado,* 338 U.S. 25 (1949),

and before *Mapp v. Ohio*, 367 U.S. 643 (1961). Affirmance unnecessarily forecloses such reconsideration.

5. Vacating and remanding will permit the California court to clarify the California law on searching cars impounded under the vehicle forfeiture statute. Affirmance leaves that law unclear. See Calif. Rule of Court No. 24(a) (finality of decision); *Scoville v. Keglor*, 29 Cal.App.2d 66, 67, 84 P.2d 212 (1938) (same). A California police officer may learn that the search in this case was held constitutional but if he attempts similar searches he will not know whether he is violating a California law of higher standards.

6. Vacating and remanding will also permit the California court to fully consider whether the seizure was valid. Although it said in passing that the car was in lawful custody (R. 266), it also made clear that the record disclosed no forfeiture proceedings (R. 261) and it did not rule on the following specific, now critical, questions under Health and Safety Code section 11611: (1) Whether the arrest on December 21, 1961 by federal agent Yates (R. 88, 89, 113, 260), was the required arrest by a "peace officer of this State." See Pen. Code § 817; *People v. Yet Ning Yee*, 145 Cal.App.2d 513, 516-517, n. 4, 302 P.2d 616 (1956). (2) Whether federal agent Yates was even authorized to make an arrest for violation of a state narcotics law, as required by section 11611. See 26 U.S.C.A. § 7607 (Supp. 1966); *cf. United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920